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No. 81-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF HOUSTON, TEXAS,
Petitioner,

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

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February 26, 1982

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REPLY MEMORANDUM

The petition for a writ of certiorari filed by the City of Houston presents two questions. On this reply, Houston will further address only the first question. The first is whether the Circuit Court of Appeals erred in its determination that the Clear Air Act permits the Environmental Protection Agency to establish National Ambient Air Quality Standards for ozone which are impossible to meet because of natural conditions not within human control. In their brief in opposition, respondents in effect enter a plea of confession and avoidance. Respondents do not deny that the decision below allows the agency to disregard evidence that it is impossible to comply with an air quality standard due to natural conditions. In-

stead, respondents suggest that Houston's evidence, which the agency below refused to consider, does not prove that Houston will be unable to comply with the ozone standards.

Respondents hold out the possibility that Houston will not find itself out of compliance due to natural conditions on a "routine" basis, and that Houston therefore will be entitled to invoke an exception from the standards for ozone. In the first place, only respondents' *ipse dixit* supports the notion that natural ozone conditions will not force Houston to exceed the standard on a "routine" basis. Second, the ozone standards do not require "routine" compliance; they require near-total compliance, permitting an average exceedance of only *one* day per year. 40 C.F.R. § 50.9(a) (1981). Third, the "exception" which respondents cite does not permit non-compliance on a less than "routine" basis. In fact, the "exception" cited does not permit non-compliance at all. That regulation provides:

> *For purposes of developing a control strategy*, data derived from measurements of existing ambient levels of a pollutant may be adjusted to reflect the extent to which occasional natural or accidental phenomena, *e.g.*, dust storms, forest fires, industrial accidents, demonstrably affected such ambient levels during the measurement period.

40 C.F.R. § 51.12(d) (1981) (emphasis added). Once the control strategy is decided upon, the states are obligated to enforce compliance. 42 U.S.C. § 7413. In short, even if, for the sake of argument, Houston's continuing ozone problems could be analogized to "dust storms, forest fires [or] industrial accidents," the regulation to which respondents refer is completely irrelevant.

Respondents also attempt to belittle Houston's concerns by referring to Houston's problem as "parochial." Houston is the fifth largest city in the United States, and, as Houston noted in its petition at 16 n.13, in the view

of the National Commission on Air Quality, as many as 32 U.S. counties will also be in violation of the ozone standards after 1987.

The second question presented by Houston's petition is whether respondents improperly imposed a control strategy upon Houston without adequately considering environmental conditions prevailing in Houston. Respondents dismiss any responsibility to devise a workable control strategy for Houston as a "parochial" concern. On this reply Houston will refer the Court to the amicus brief of the State of Texas. As Texas notes, by imposing an unworkable control strategy upon Houston through the State of Texas, respondents have unlawfully intruded upon the rights of the states under the Clean Air Act to develop their own implementation plans designed to take into account local conditions.

For the reasons stated here and in the *amicus* brief of Texas and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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